UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.9/471/Add.9
2 December 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-third session
New York, 12 June - 7 July 2000

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

CONSOLIDATED LEGISLATIVE RECOMMENDATIONS

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FOREWORD

Each chapter of the Guide contains a set of recommended legislative principles entitled "Legislative Recommendations". The Legislative Recommendations are intended to assist in the establishment of a legislative framework favourable to privately financed infrastructure projects. The Legislative Recommendations contained in the Guide are followed by notes which offer an analytical introduction with references to financial, regulatory, legal, policy, and other issues raised in the subject area. The full text of all Legislative Recommendations contained in the Guide is reproduced hereafter for ease of reference. The user is advised to read the Legislative Recommendations together with the notes, which provide background information to enhance the understanding of the Legislative Recommendations.

The Legislative Recommendations deal with matters which it is important to address in legislation specifically concerned with privately financed infrastructure projects. They do not deal with other areas of law which, as discussed in notes to the Legislative Recommendations, also have an impact on privately financed infrastructure projects. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources, economic stability.

For host countries wishing to promote privately financed infrastructure projects it is recommended that the following principles should be implemented by the law:

I. GENERAL LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

Constitutional and legislative framework (see chap. I, "General legislative and institutional framework", paras. 2-14)

Recommendation 1. The legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness, and the long-term sustainability of projects. Undesirable restrictions to private sector participation in infrastructure development and operation should be eliminated.

Scope of authority to award concessions (see chap. I, "General legislative and institutional framework", paras. 15-22)

Recommendation 2. The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) which are empowered to enter into agreements for the implementation of privately financed infrastructure projects.

Recommendation 3. Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems.

Recommendation 4. The law should identify the sectors or types of infrastructure in respect of which concessions may be granted.

Recommendation 5. The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.

Administrative coordination (see chap. I, "General legislative and institutional framework", paras. 23-29)

Recommendation 6. Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.

Authority to regulate infrastructure services (see chap. I, "General legislative and institutional framework", paras. 30-53)

Recommendation 7. The authority to regulate infrastructure services should not be entrusted to entities which directly or indirectly provide infrastructure services.

Recommendation 8. Regulatory competence should be entrusted to functionally independent bodies with a sufficient level of autonomy to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers.

Recommendation 9. The rules governing regulatory procedures should be published. Regulatory decisions should state the reasons on which they are based and be accessible to interested parties through publication or other means.

Recommendation 10. The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body and set forth the grounds on which a request for review may be based and the availability of court review.

Recommendation 11. Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.

II. PROJECT RISKS AND GOVERNMENT SUPPORT

Project risks and risk allocation (see chap. II, "Project risks and Government support", paras. 8-29)

Recommendation 12. No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project.

Government support (see chap. II, "Project risks and government support", paras. 30-60)

Recommendation 13. The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.

III. SELECTION OF THE CONCESSIONAIRE

General considerations (see chap. III, "Selection of the concessionaire", paras. 1-33)

Recommendation 14. The law should provide for the selection of the concessionaire through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects.

Preselection of bidders (see chap. III, Selection of the concessionaire", paras. 34-50)

Recommendation 15. The bidders should demonstrate that they meet the preselection criteria which the contracting authority considers appropriate for the particular project, including:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities, as necessary to carry out all the phases of the project, namely engineering, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain the financing requirements for the engineering, construction and operational phases of the project;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating public infrastructure.

Recommendation 16. The bidders should be allowed to form consortia to submit proposals, provided that each member of a preselected consortium may participate, either directly or through subsidiary companies, in only one bidding consortium.

Recommendation 17. The contracting authority should elaborate a short list of the preselected bidders which will be subsequently invited to submit proposals upon completion of the preselection phase.

Procedure for requesting proposals (see chap. III, Selection of the concessionaire", paras. 51-84)

Single-stage and two-stage procedure for requesting proposals

Recommendation 18. Upon completion of the preselection proceedings, the contracting authority should invite the preselected bidders to submit final proposals.

Recommendation 19. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from preselected bidders when it is not feasible for the contracting authority to formulate project specifications or performance indicators and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated. Where a two-stage procedure is used, the following provisions apply:

(a) The contracting authority should first call upon the preselected bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms;

(b) The contracting authority may convene a meeting of bidders to clarify questions concerning the initial request for proposals;

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial project specifications and contractual terms prior to issuing a final request for proposals.

Content of the final request for proposals

Recommendation 20. The final request for proposals should include at least the following:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;

(c) The contractual terms proposed by the contracting authority;

(d) The criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals.

Clarifications and modifications

Recommendation 21. The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, modify the final request for proposals by issuing addenda at a reasonable time prior to the deadline for submission of proposals.

Evaluation criteria

Recommendation 22. The criteria for the evaluation and comparison of the technical proposals should concern the effectiveness of the proposal submitted by the bidder in meeting the needs of the contracting authority, including the following:

(a) Technical soundness;

(b) Operational feasibility;

(c) Quality of services and measures to ensure their continuity;

(d) Social and economic-development potential offered by the proposals.

Recommendation 23. The criteria for the evaluation and comparison of the financial and commercial proposals may include, as appropriate:

(a) The present value of the proposed tolls, fees, and other charges over the concession period;

(b) The present value of the proposed direct payments by the contracting authority, if any;

(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) The extent of financial support, if any, expected from the Government;

(e) Soundness of the proposed financial arrangements;

(f) The extent of acceptance of the proposed contractual terms.

Submission, opening, comparison and evaluation of proposals

Recommendation 24. The contracting authority may establish thresholds with respect to quality, technical and commercial aspects to be reflected in the proposals in accordance with the criteria as set out in the request for proposals. Proposals which fail to achieve the thresholds should be regarded as non-responsive.

Recommendation 25. Whether or not it has used preselection proceedings the contracting authority may retain the right to require the bidders to demonstrate again their qualifications in accordance with criteria and procedures set forth in the request for proposals or the preselection documents, as appropriate. Where preselection proceedings have been used, the criteria shall be the same as those used in the preselection proceedings.

Final negotiations

Recommendation 26. The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has attained the best rating. Final negotiations may not concern those terms of the contract that were stated as non-negotiable in the final request for proposals.

Recommendation 27. If it becomes apparent to the awarding authority that the negotiations with the bidder invited will not result in a project agreement, the awarding authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the other bidders on the basis of their ranking until it arrives at a project agreement or rejects all remaining proposals.

Direct negotiations (see chap. III, Selection of the concessionaire", paras. 85-96)

Recommendation 28. The law should set forth the exceptional circumstances under which the contracting authority may be authorized by a higher authority to select the concessionaire through direct negotiations, such as:

(a) When there is an urgent need for ensuring continuity in the provision of the service, and engaging in a competitive selection procedure would therefore be impractical;

(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

(c) Reasons of national defence or national security;

(d) Cases where there is only one source capable of providing the required service (e.g. because it requires the use of patented technology or unique know-how);

(e) When an invitation to the preselection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals, and in the judgement of the contracting authority issuing a new request for proposals would be unlikely to result in a project award;

(f) Other cases where the higher authority authorizes such an exception for compelling reasons of public interest.

Recommendation 29. The law may require that the following procedures be observed in direct negotiations:

(a) The contracting authority should publish a notice of the negotiation proceedings and engage in negotiations with as many companies judged capable of carrying out the project as circumstances permit;

(b) The contracting authority should establish and make known to bidders the qualification criteria and the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals;

(c) The contracting authority should treat proposals in a manner which avoids the disclosure of their contents to competing bidders;

(d) Any such negotiations between the contracting authority and bidders should be confidential and one party to the negotiations should not reveal to any other person any technical, price or other commercial information relating to the negotiations without the consent of the other party;

(e) Following completion of negotiations, the contracting authority should request all bidders remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals;

(f) Proposals should be evaluated and ranked according to the criteria for the evaluation of proposals established by the contracting authority.

Unsolicited proposals (see chap. III, Selection of the concessionaire", paras. 97-117)

Recommendation 30. By way of exception to the selection procedures described in legislative recommendations 12 to 25, the contracting authority may be authorized to handle unsolicited proposals pursuant to specific procedures established by the law for handling unsolicited proposals, provided that such proposals should not relate to a project for which selection procedures have been initiated or announced by the contracting authority.

Procedures for determining the admissibility of unsolicited proposals

Recommendation 31. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority should inform the proponent, within a reasonably short period, whether or not there is a potential public interest in the project. If the project is found to be in the public interest, the contracting authority should invite the proponent to submit a formal proposal in sufficient detail to allow the contracting authority to properly evaluate the concept or technology and determine whether the proposal meets the conditions set forth in the law and is likely to be successfully implemented at the scale of the proposed project.

Recommendation 32. The proponent should retain title to all documents submitted throughout the procedure, and those documents should be returned to it in the event the proposal is rejected.

Procedures for handling unsolicited proposals which do not involve proprietary concepts or technology

Recommendation 33. The contracting authority should initiate competitive selection procedures under recommendations 12 to 25 above if it is found that the envisaged output of the project can be achieved without the use of a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights or if the proposed concept or technology is not truly unique or new. The author of the unsolicited proposal should be invited to participate in such proceedings and might be given a premium for submitting the proposal.

Procedures for handling unsolicited proposals involving proprietary concepts or technology

Recommendation 34. If it appears that the envisaged output of the project cannot be achieved without using a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights, the contracting authority should seek to obtain elements of comparison for the unsolicited proposal. For that purpose, the contracting authority should publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain reasonable period.

Recommendation 35. The contracting authority may engage in negotiations with the author of the unsolicited proposal if no alternative proposals are received, subject to approval by a higher authority. If alternative proposals are submitted, the contracting authority should invite all the proponents to negotiations in accordance with the provisions of legislative recommendation 27 (b) to (f).

Review procedures (see chap. III, Selection of the concessionaire", paras. 118-122)

Recommendation 36. Bidders who claim to have suffered, or who may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts in accordance with the laws of the host country.

Notice of project award (see chap. III, Selection of the concessionaire", para. 123)

Recommendation 37. The contracting authority should cause a notice of the award of the project to be published. The notice should identify the concessionaire and include a summary of the essential terms of the project agreement.

Record of selection and award proceedings (see chap. III, Selection of the concessionaire", paras. 124-130)

Recommendation 38. The contracting authority should keep an appropriate record of key information pertaining to the selection and award proceedings. The law should set forth the public access requirements.

IV. CONSTRUCTION AND OPERATION OF INFRASTRUCTURE

General provisions on the project agreement (see chap. IV, "Construction and operation of infrastructure", paras. 1-11)

Recommendation 39. The law might identify the core terms to be provided in the project agreement which may include those terms referred to in recommendations 39 to 65 below.

Recommendation 40. Unless otherwise provided, the project agreement is governed by the law of the host country.

Organization of the concessionaire (see chap. IV, "Construction and operation of infrastructure", paras. 12-18)

Recommendation 41. The contracting authority should have the option to require that the selected bidders establish an independent legal entity with a seat in the country.

Recommendation 42. The project agreement should specify the minimum capital of the project company and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws of the project company and fundamental changes therein.

The project site and easements (see chap. IV, "Construction and operation of infrastructure", paras. 19-32)

Recommendation 43. The project agreement should specify, as appropriate, which assets will be public property and which assets will be the private property of the concessionaire. The project agreement should identify which assets the concessionaire is required to transfer to the contracting authority or to a new concessionaire upon expiry or termination of the project agreement; which assets the contracting authority, at its option, may purchase from the concessionaire; and which assets the concessionaire may freely remove or dispose of upon expiry or termination of the project agreement.

Recommendation 44. The contracting authority should assist the concessionaire in the acquisition of easements needed for the operation, construction and maintenance of the facility. The law might empower the concessionaire to enter upon, transit through, do work or fix installations upon, property of third parties, as required for the construction and operation of the facility.

Financial arrangements (see chap. IV, "Construction and operation of infrastructure", paras. 33-51)

Recommendation 45. The law should enable the concessionaire to collect tariffs or user fees for the use of the facility or the services it provides. The project agreement should provide for methods and formulas for the adjustment of those tariffs or user fees.

Recommendation 46. Where the tariffs or fees charged by the concessionaire are subject to external control by a regulatory body, the law should set forth the mechanisms for periodic and extraordinary revisions of the tariff adjustment formulas.

Recommendation 47. The contracting authority should have the power, where appropriate, to agree to make direct payments to the concessionaire as a substitute for, or in addition to, service charges to be paid by the users or to enter into commitments for the purchase of fixed quantities of goods or services.

Security interests (see chap. IV, "Construction and operation of infrastructure", paras. 52-61)

Recommendation 48. The concessionaire should be responsible for raising the funds required to construct and operate the infrastructure facility and, for that purpose, should have the right to secure any financing required for the project with a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the concession, or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property in the possession of the concessionaire.

Assignment of the concession (see chap. IV, "Construction and operation of infrastructure", paras. 62-63)

Recommendation 49. The project agreement should set forth the conditions under which the contracting authority might give its consent to an assignment of the concession, including the acceptance by the new concessionaire of all obligations under the project agreement and evidence of the new concessionaire's technical and financial capability as necessary for providing the service. The concession should not be assigned to third parties without the consent of the contracting authority .

Transfer of controlling interest in the project company (see chap. IV, "Construction and operation of infrastructure", paras. 64-68)

Recommendation 50. The transfer of a controlling interest in the capital of a concessionaire company may require the consent of the contracting authority.

Construction works (see chap. IV, "Construction and operation of infrastructure", paras. 69-79)

Recommendation 51. The project agreement should set forth the procedures for the review and approval of construction plans and specifications by the contracting authority, the contracting authority's right to monitor the

construction of, or improvements to, the infrastructure facility, the conditions under which the contracting authority may order variations in respect of construction specifications and the procedures for testing and final inspection, approval and acceptance of the facility, its equipment and appurtenances.

Infrastructure operation (see chap. IV, "Construction and operation of infrastructure", paras. 80-97)

Recommendation 52. The project agreement should set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

(a) The adaptation of the service so as to meet the actual demand for the service;

(b) The continuity of the service;

(c) The availability of the service under essentially the same conditions to all users;

(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

Recommendation 53. The project agreement should set forth:

(a) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;

(b) The procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements.

Recommendation 54. The concessionaire should have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

General contractual arrangements (see chap. IV, "Construction and operation of infrastructure", paras. 98-150)

Recommendation 55. The contracting authority may reserve the right to review and approve major contracts to be entered into by the concessionaire, in particular contracts with the concessionaire's own shareholders or related persons. The contracting authority's approval should not normally be withheld except where the contracts contain provisions inconsistent with the project agreement or manifestly contrary to the public interest or to mandatory rules of a public law nature.

Recommendation 56. The concessionaire and its lenders, insurers and other contracting partners should be free to choose the law applicable to govern their contractual relations, except where such a choice would violate the host country's public policy.

Recommendation 57. The project agreement should set forth:

(a) The forms, duration and amounts of the guarantees of performance that the concessionaire may be required to provide in connection with the construction and the operation of the facility;

(b) The insurance policies that the concessionaire may be required to maintain;

(c) The compensation to which the concessionaire may be entitled following the occurrence of legislative changes or other changes in the economic or financial conditions that render the performance of the obligation substantially more onerous than originally foreseen. The project agreement should further provide mechanisms for revising the terms of the project agreement following the occurrence of any such changes;

(d) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the project agreement due to circumstances beyond their reasonable control;

(e) Remedies available to the contracting authority and the concessionaire in the event of default by the other party.

Recommendation 58. The project agreement should set forth the circumstances under which the contracting authority may temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations.

Recommendation 59. The contracting authority should be authorized to enter into agreements with the lenders providing for the appointment, with the consent of the contracting authority, of a new concessionaire to perform under the existing project agreement if the concessionaire seriously fails to deliver the service required or if other specified events occur that could justify the termination of the project agreement.

V. DURATION, EXTENSION AND TERMINATION OF THE PROJECT AGREEMENT

Duration and extension of the project agreement (see chap. V, "Duration, extension and termination of the project agreement", paras. ___)

Recommendation 60. The duration of the concession should be specified in the project agreement.

Recommendation 61. The term of the concession should not be extended, except for those circumstances specified in the law, such as:

(a) Completion delay or interruption of operation due to the occurrence of circumstances beyond either party's reasonable control;

(b) Project suspension brought about by acts of the contracting authority or other public authorities;

(c) To allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the project agreement which the concessionaire would not be able to recover during the normal term of the project agreement.

Termination of the project agreement (see chap. V, "Duration, extension and termination of the project agreement", paras. ___)

Termination by the contracting authority

Recommendation 62. The contracting authority should have the right to terminate the project agreement:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, due to insolvency, serious default or otherwise;

(b) For reasons of public interest, subject to payment of compensation to the concessionaire.

Termination by the concessionaire

Recommendation 63. The concessionaire should have the right to terminate the project agreement under exceptional circumstances specified in the law, such as:

(a) In the event of serious default by the contracting authority or other public authority as regards the fulfilment of their obligations under the project agreement;

(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of variation orders or other acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the project agreement.

Termination by either party

Recommendation 64. Either party should have the right to terminate the project agreement in the event that the performance of its obligations is rendered impossible by the occurrence of circumstances beyond either party's reasonable control. The parties should further have the right to terminate the project agreement by mutual consent.

Consequences of expiry or termination of the project agreement (see chap. V, "Duration, extension and termination of the project agreement", paras. ___)

Transfer of assets to the contracting authority or to a new concessionaire

Recommendation 65. The project agreement should lay down the criteria for establishing, as appropriate, the compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority upon expiry or termination of the project agreement.

Financial arrangements upon termination

Recommendation 66. The project agreement should stipulate how compensation due to either party in the event of termination of the project agreement is to be calculated, providing, where appropriate, for compensation for the fair value of works performed under the project agreement, and for losses, including lost profits.

Wind-up and transfer measures

Recommendation 67. The project agreement should set out, as appropriate, the rights and obligations of the parties with respect to:

(a) The transfer of technology required for the operation of the facility;

(b) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(c) The provision, by the concessionaire, of operation and maintenance services and the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

VI. SETTLEMENT OF DISPUTES

Disputes between the contracting authority and the concessionaire (see chap. VI, "Settlement of disputes", paras. ___)

Recommendation 68. The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as suited to the needs of the project, including arbitration.

[*Recommendation 68 bis.* The law should indicate whether, and, if so, to what extent the contracting authority may raise a plea of sovereign immunity, both as a bar to the commencement of arbitral or judicial proceedings as well as a defense against enforcement of the award or judgement.]

Disputes between the concessionaire and its lenders, contractors and suppliers (see chap. VI, "Settlement of disputes", paras. ___)

Recommendation 69. The concessionaire should be free to choose the appropriate mechanisms for settling commercial disputes among the project sponsors, or disputes between the concessionaire and its lenders, contractors, suppliers and other business partners.

Disputes between the concessionaire and its customers (see chap. VI, "Settlement of disputes", paras. ___)

Recommendation 70. The concessionaire may be required to make available simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.